No. 92-910

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARY SUE DAVIS STOWE,

Petitioner,

—v.—

JUNIOR LEWIS DAVIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, AT KNOXVILLE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should a petition for writ of certiorari be granted where the central question raised -- are the unborn "persons" within the meaning of the Fourteenth Amendment to the United States Constitution -- has long been settled by this Court?

2. Does the Tennessee Supreme Court's ruling, balancing Mr. Davis's interest in avoiding parenthood and Ms. Stowe's interest in donating, to an unknown couple, the seven preembryos in dispute in this case, create new law or conflict with prior decisions of this Court?

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Respondent Junior Lewis Davis submits this brief in opposition to the petition for writ of certiorari filed by Petitioner, Mary Sue Davis Stowe. The petition seeks review of the unanimous decision of the Supreme Court of Tennessee, issued June 1, 1992, determining the disposition of seven cryogenically preserved preembryos produced by *in vitro* fertilization. *Davis v. Davis*, No. 34 (Tenn. June 1, 1992).

COUNTERSTATEMENT OF THE CASE

This case began as a divorce action filed by Respondent, Junior Lewis Davis (hereinafter Mr. Davis) against Petitioner Mary Sue Davis on February 23, 1989, in the Circuit Court for Blount County, Tennessee.[1] The parties agreed on all issues except the disposition of seven "frozen embryos" stored at a Tennessee fertility clinic. 32a.[2]

Petitioner and Respondent were married for nine years, and during that time they tried to have a child or children. Tr. II at 173, 177, 179.[3] Throughout their marriage all decisions regarding attempts to have children had been joint ones. Tr. II at 121, 182, 202-07. During the first several years of the parties' marriage, Ms. Stowe suffered five ectopic (tubal) pregnancies. Tr. II at 186. Eventually she lost the use of both of her fallopian tubes. Tr. I at 24-26. Still hoping to have a child, the parties elected to attempt to do so through *in*

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[1] The Petitioner subsequently remarried and adopted the surname Stowe. She will be referred to in this brief as Ms. Stowe.

[2] Citations to the Appendix to the petition for writ of certiorari are in the form "_____a"; those to the Appendix to this brief are in the form "A-___."

[3] Citations to the three volume Trial Transcript are in the form "Tr.[vol.] at [page]."

vitro fertilization (hereinafter "IVF") under the care of the original third party defendant, Dr. I. Ray King. Tr. I at 23.[4]

In IVF a woman undergoes surgery to have a number of ova removed from the follicles of her ovaries. Those ova are then fertilized in a petri dish with sperm donated by a man. Then, one or more of the fertilized ova, or preembryos, are transferred to the woman's uterus in the hope that the preembryos will implant and result in a pregnancy and the birth of a child or children. *See* Tr. I at 30-39, 43-44; Tr. II at 9-35; *see also* 35-36a.

Beginning in 1985, the parties went through six unsuccessful attempts to have a child through IVF. Tr. I at 44-45; Tr. II at 107-08, 184. For a period of time they stopped doing IVF while they sought unsuccessfully to adopt a child. Tr. II at 117-19. In November of 1988, the parties returned to Dr. King's office to try once more to have a child through IVF. Unlike all previous efforts, this time Dr. King now had the ability to cryopreserve, or freeze for potential later use, any "surplus" preembryos not used for immediate transfer. Tr. I at 39-40. On December 8, 1988, nine ova were removed from Ms. Stowe's ovaries and subsequently fertilized by Mr. Davis's sperm. Tr. I at 41, 45; Tr. II at 187. On December 10, 1988, two of the resulting preembryos were transferred into Ms. Stowe's uterus, Tr. I at 45, and the parties consented to the remaining seven being placed in cryopreservation for possible later use if Ms. Stowe did not become pregnant. Tr. I at 41. Ms. Stowe did not become pregnant. Tr. I at 105.

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[4] I. Ray King, M.D., d/b/a Fertility Center of East Tennessee was dropped as a third party defendant by the time the case went to the Tennessee Court of Appeals. *See* Order No. 34 (Tenn. March 26, 1991).

At no time prior to the cryopreservation of the seven preembryos were either of the parties informed by Dr. King, or anyone else, of the profound change cryopreservation would make in their involvement in IVF. The parties received no counselling on this point and signed no consent forms. Tr. I at 51-52, 80, 199; Tr. II at 113, 123, 131. Moreover they were never asked by Dr. King to make any decisions regarding possible future disposition of the frozen preembryos, Tr. I at 81-82; Tr. II at 131, 167, nor did they ever discuss the matter between themselves. Tr. II at 139. *See also* Tr. I at 101. At no time did the parties agree on any subsequent use, by themselves or others, of any of the stored preembryos. Tr. II at 135.

At trial Petitioner, who was then twenty-eight, testified about the numerous painful and life-threatening tubal pregnancies she had suffered, Tr. II at 177-213, and the unsuccessful attempts through surgery to repair her fallopian tubes. Tr. II at 180-82. She also described her experience with IVF which involved repeated painful and frightening injections, numerous medical tests, taking medication, and undergoing multiple surgical procedures. Tr. II at 184-86, 192, 194. Regarding the preembryos, Ms. Stowe testified that she "would like for them to be awarded to me so I can have my child" despite the divorce. Tr. II at 192-93. She hoped to have one, or possibly two, children sometime in the future, depending upon how her life progressed. Tr. II at 195-97, 212-13.

Mr. Davis testified during trial that he strongly objected to any disposition of the preembryos without the parties' mutual consent.[5] Tr. II at 141. Based upon his own personal

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[5] Mr. Davis did not ask the trial court, however, to discard the preembryos because he recognized there was a slight chance he might change his mind at some future date. Tr. II at 140-41, 152-53. By the (continued...)

history, he vehemently opposed Ms. Stowe using the preembryos to attempt to have a child or to donate them to another couple. Tr. II at 152. Mr. Davis explained, "I do not want a child in a single parent situation because I myself was raised in a broken family away from my parents . . ." Tr. II at 142. When Mr. Davis was five years old his parents divorced. Tr. II at 143. Shortly after the divorce, his mother suffered a nervous breakdown and placed him and three of his brothers in a boys' home run by the Lutheran Church. Tr. II at 143. Separated from both his parents and his remaining brother and sister, Mr. Davis lived at the boys home until he was grown. Tr. II at 144, 147. At trial he testified about the emotional distress he suffered, Tr. II at 142-45, and explained that he did not want "to bring a child into this world . . . where that child [could] have more emotional pain than maybe either [Mary or myself have] had in trying to [have a child]." Tr. II at 148.

Mr. Davis further testified at trial that if the court allowed Ms. Stowe to transfer the preembryos and she had a child as a result, he would do everything possible to be a part of that child's life. Tr. II at 147, 148, 160-61. He clarified, however, that he objected to any child of his being raised in a "broken family." Tr. II at 142. He explained that if the preembryos were donated there would be no guarantee that that couple would not end up divorced. Tr. II at 151.

Four witnesses, called as experts, offered testimony at trial: I. Ray King, M.D., a board certified gynecologist practicing in the field of infertility and Ms. Stowe's treating physician; Charles A. Shivers, an embryologist and professor of embryology at the University of Tennessee; John A. Robertson, Professor of Law at the University of Texas at

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[5](...continued)
time the case was heard by the Tennessee Supreme Court, however, he had become certain he would never change his position. 33a.

Austin and a member of the ethics committee of the American Fertility Society; and Jerome LeJeune, a French geneticist who travelled from France to testify on behalf of Petitioner at trial.

Doctors King and Shivers and Mr. Robertson all took the position that the subject matter of this dispute should be called "preembryos." *See*, Tr. I at 49, 114-17; Tr. II at 29. A preembryo is the product of the union of egg and sperm from the first cell division until fourteen days after fertilization. Tr. I at 49-50. The preembryo is "a group of undifferentiated cells, two cells, four cells, perhaps eight . . . that have not separated into organs or even the beginning of a nervous system." Tr. I at 115; *see also* Tr. I at 49-50, 89; Tr. II at 64. It is only after fourteen days from fertilization "that differentiated organs, human form, heart beat, capacity for nervous system will begin to develop." Tr. I at 116. It is "not even clear that you have a unique individual at the pre-embryo stage, because natural twinning may occur later . . ." Tr. II at 117; *see also* Tr. I at 89.

Dr. Lejeune, who did not claim expertise in the field of embryology, Tr. III at 26, 64, took the position that "embryo" rather than "preembryo" is the proper term to be applied to the four-to eight-celled entities at issue in this case. Tr. III at 30-31. During his testimony however, he referred to the cells as "babies", Tr. III at 16, "early human beings," Tr. III at 35-36, 47, 48, 51, "tiny human beings," Tr. III at 34, and "man." Tr. III at 48. Dr. Lejeune also described the "straw," Tr. II at 39, in which a cryopreserved preembryo is stored as a "concentration can," Tr. III at 34, and a woman's uterus as "the secret temple which is inside the female body." *Id.* Dr. Lejeune took the position that these cells are "differentiated" in the sense that they contain a unique genetic code. Tr. III at 38, 50.

Witnesses testified that cryopreservation could pose a risk to the preembryos. Only sixty-five to seventy-five percent of preembryos survive freezing and thawing. Tr. II at 70, 82-83; *see also* Tr. III at 28-29, 85. Indeed, it cannot be known whether or not the seven preembryos at issue in this case survived the freezing unless they are thawed. Tr. I at 73-74; Tr II at 37, 46. Based on experience at that time, experts testified that human preembryos that survived freezing and thawing had been successfully transferred two years after they had been frozen. Tr. II at 46; Tr. I at 72. Dr. Shivers, however, clarified "[t]hat doesn't mean after two years those embryos are no longer viable. That's the longest that human embryos have been stored." Tr. II at 46-47. Extrapolating from experience with other mammals, it might be possible to use human preembryos as long as ten years after they have been cryopreserved. Tr. II at 47.[6] *See also* 48a n. 22.

However long the preembryos might last, witnesses testified that their chances of implantation and development to live birth are at best slight. Even when fertilization occurs normally, without IVF, "there is a very low probability that any preembryo will develop further [and] attach to the uterus, and even if it does attach will develop to the next stages." Tr. I at 117; *see also* Tr. I at 149-50, Tr. II at 62, 67. Nationally, at the time of the trial, there was only a twelve percent success rate for live births after IVF. Tr. I at 29. Between 1984 and 1989, the time of the trial, Dr. King had only one client who was able to have a baby after IVF. Tr. I at 29, 172. Experts at trial estimated that in Ms. Stowe's case there was only a ten percent chance she would get pregnant and an eight percent chance that she would give birth after

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[6] Dr. Robertson testified that the American Fertility Society suggests that cryopreserved preembryos be preserved for no longer than the "reproductive life of the woman." Tr. I at 165. The duration of Ms. Stowe's reproductive life would be approximately twenty-four years from the time of the trial. *See* Tr. I at 82-83.

IVF. Tr. I at 46, 183. In Ms. Stowe's previous six attempts with IVF, using a total of fourteen preembryos, no pregnancies resulted. Tr. I at 44-45.

DECISIONS BELOW

On September 21, 1989, the Circuit Court for Blount County held that the seven cryogenically preserved preembryos are "human beings, in vitro, to be known as . . . children," and that it was "to the manifest best interests of the child or children in vitro, that they be available for implantation." 68a. The court awarded custody of the preembryos to Ms. Stowe and directed that she "be permitted the opportunity to bring [these children] to term through implantation." *Id.*

Mr. Davis appealed the circuit court's decision. On appeal, Ms. Stowe took the position that she no longer wanted to implant the preembryos, but rather wanted to donate them to another couple. In her appellate brief Petitioner stated:

> Since the conclusion of this trial, appellee has moved to Florida where she has married, and she now goes by the name of Mary Stowe. She has directed the undersigned to inform this Court that her intention should the Court uphold the lower court's judgment is not to implant the embryos, and she wants authority to donate the embryos so that another childless couple may use them.

62a n.1; *see also*, 33a. Petitioner also abandoned her position that the preembryos were "human beings," conceding on appeal that they represented only "potential life." 41a n.16. Respondent has consistently taken the position that the preembryos are not life, but rather potential life, Tr. II at 153-

54, and that he does not want to become a father -- whether Ms. Stowe uses the preembryos herself or if they are donated. *See* Tr. II at 152.

On September 19, 1990, the Court of Appeals reversed the trial court's holding that the preembryos are "persons." 65a. The court concluded that "it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological, if not legal, consequences of paternity against his will." 65a. The court held that the partners share an interest in the "seven fertilized ova" and remanded the case to the trial court to enter a judgment vesting both parties "with joint control" and "equal voice over their disposition." *Id.*

Ms. Stowe appealed to the Tennessee Supreme Court. On June 1, 1992, the Supreme Court upheld the intermediate court's opinion in so far as it found that the preembryos are not "persons." Specifically rejecting the testimony of Dr. Lejeune, the court held that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life." 38a, 46a.

The Tennessee Supreme Court went on to determine that "the essential dispute . . . is not where or how or how long to store the preembryos, but whether the parties will become parents." 49a. The answer to the question, the court concluded, "turns on the parties' exercise of their constitutional right to privacy." *Id.* The Tennessee Court found that there is a right to privacy including the right of procreational autonomy that "is composed of two rights of equal significance — the right to procreate and the right to avoid procreation." 53a. Based on this, the Court held that the decisional authority regarding the preembryos rests solely in the gamete providers; in this case, Petitioner and

Respondent. 54a. As a result, the court held that where there is no previous written agreement between the parties concerning disposition of the preembryos and where they cannot agree on disposition, "the relative interests of the parties in using or not using the preembryos must be weighed." 59a.[7]

Balancing Respondent's interest "in avoiding parenthood" and Petitioner's "interest in donating the preembryos to another couple for implantation," 58a, the court concluded that Respondent's interest prevailed. The court explained, "if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail." 59a.

On June 26, 1992, Ms. Stowe filed in the Supreme Court of Tennessee an amended petition for rehearing which was denied by that court on November 23, 1992. On November 24, 1992, Ms. Stowe filed with this Court a petition for writ of certiorari.

On January 5, 1993 the petitioner filed a motion to expedite consideration of her petition, claiming that she would now like to "implant the embryos [in her]self." Letter of Mary S. Stowe to the United States Supreme Court attached as Exhibit C to Motion to Expedite Consideration of Petition for Writ of Certiorari. The Tennessee Supreme Court addressed in *dicta* this possibility, concluding that:

> The case would be closer if Mary Sue Davis were seeking to use the preembryos herself, but only if she

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[7] The court also concluded that "an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors." 46-47a.

> could not achieve parenthood by any other reasonable means. We recognize the trauma that Mary Sue has already experienced and the additional discomfort to which she would be subjected if she opts to attempt IVF again. Still, she would have a reasonable opportunity, through IVF, to try once again to achieve parenthood in all its aspects -- genetic, gestational, bearing, and rearing. Further, we note that if Mary Sue Davis were unable to undergo another round of IVF, or opted not to try, she could still achieve the child-rearing aspects of parenthood through adoption.

59a. Petitioner's letter to this Court does not indicate that any of these conditions, ability to try IVF again or to adopt, have changed. Moreover, Petitioner's new position is not properly before this Court. If indeed there has been a change in Petitioner's position or circumstances, she should withdraw the petition for writ of certiorari and file a motion for post-judgment relief due to changed factual circumstances pursuant to Tenn. R. Civ. P. 60.02(5).

The question before this Court is whether it has jurisdiction to review the decision in *Davis v. Davis* based on the facts and circumstances presented to the Tennessee Supreme Court. Petitioner may not seek review of the Tennessee Supreme Court's decision based on facts or circumstances not presented below.

REASONS FOR DENYING THE WRIT

Petitioner's request for a Writ of Certiorari should be denied because she has failed to establish any of the factors that weigh in favor of granting the petition. Petitioner claims that this case involves "an important question of federal law

which has not been, but should be, settled" Sup. Ct. R. 10.1(c), or decides "a federal question in a way that conflicts with applicable decisions of this court." *id.* Specifically she argues that the "[o]pinion of the Tennessee Supreme Court conflicts with and misapprehends the controlling principles and precedents of the Federal Right of Privacy under the Due Process Clause of the Fourteenth Amendment of the United States Constitution." Pet. at 7.[8]

The Tennessee Supreme Court's decision may be divided into four separate holdings: 1) a preembryo is not a person under the law; 2) both Petitioner, Ms. Stowe, and Respondent, Mr. Davis, have a fundamental right to procreational privacy; 3) this right includes the right to avoid becoming a parent; and 4) when the parties disagree and there is no prior agreement, their competing rights and interests must be balanced.

The only holding that Petitioner seriously challenges is the finding that the preembryos are not "persons." To the extent that Petitioner challenges the other holdings of the Tennessee Supreme Court, she does so because they lead to a result inconsistent with her view that the preembryos are "persons." Because this Petition is really nothing more than a desperate attempt to convince this Court to reverse its consistent holdings that the unborn are not persons under the law, *Roe v. Wade*, 410 U.S. 113, 162 (1973), this Court must deny the writ.

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[8] Citations to the petition for writ of certiorari are in the form "Pet. at ___."

I. THE TENNESSEE SUPREME COURT'S FINDING THAT PREEMBRYOS ARE NOT "PERSONS" IS CONSISTENT WITH SETTLED FEDERAL LAW.

Consistent with the federal constitution and this Court's decisions, the Tennessee Supreme Court held that the seven human "preembryos"[9] at issue in this case, each consisting of four to eight undifferentiated cells, cannot be considered "persons"[10] under Tennessee law. 37-38a; 41-43a. The Tennessee Supreme Court noted:

> In *Roe v. Wade*, the United States Supreme Court explicitly refused to hold that the fetus possesses independent rights under law . . . The Supreme Court concluded that "the unborn have never been recognized in the law as persons in the whole sense." As a matter of constitutional law, this conclusion has never been seriously challenged.

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[9] The Tennessee Supreme Court determined that the proper scientific name for the subject matter in dispute in this case is "preembryo." *See* 37-43a. The court made clear however, that the distinction between an embryo and a preembryo was "not dispositive in the case," 40a, and its decision would be the same regardless of what they were called. *Id.*

[10] The record illustrates that petitioner has repeatedly changed her position with respect to the status of the preembryos. In the circuit court, she argued that human life begins at the moment of conception, a position the trial court accepted in its ruling that the eight cell entities at issue were "children, in vitro." 68a. In the Tennessee Court of Appeals and Supreme Court, she abandoned this argument by conceding that the preembryos represented only "potential life." 41a n. 16. The petitioner now argues that the preembryos are "little children," Pet. at 18, and argues that they are "lives with potential." Pet. at 4. Petitioner also describes the preembryos as "extremely young human beings," Pet. at 9; "youngest humans," Pet. at 16; and "living children in vitro," Pet. at 17.

42-43a (citations omitted).[11]

Most recently, in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), this Court explicitly reaffirmed *Roe*'s essential holdings. As Justice Stevens noted, "implicit in the Court's analysis [is] . . a reaffirmation of *Roe*'s explanation of *why* the State's obligation to protect the life or health of the mother must take precedence over any duty to the unborn." *Id.* at 2839 (Stevens, J., concurring in part and dissenting in part).[12] He further reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

Id.[13]

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[11] *See also Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 799 n. 8 (1986) (Stevens, J., concurring) ("[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment").

[12] The Tennessee Supreme Court held that under Tennessee's public policy and its state constitutional right of privacy, preembryos are not "persons" and that "the state's interest in potential human life is insufficient to justify an infringement on the gamete-providers' procreational autonomy" 41-42a; 55a. Petitioner's attack on this interpretation of Tennessee law, *see* Pet. at 7, is beyond the jurisdiction of this Court because it is wholly a question of state law. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

[13] Even Justice Scalia's opinion in *Casey* lends no support to petitioner's contention that a preembryo is guaranteed constitutional rights. Justice Scalia argued that the "States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do

(continued...)

Unable to cite a single authority, state or federal, holding that a fetus, much less a preembryo, is a "person" under either the United States or Tennessee Constitutions, Petitioner argues that "the human embryos are entitled to full Fourteenth Amendment rights of 'persons' under" former President Reagan's "National Sanctity of Human Life Day" Proclamation.[14] Pet. at 19. Petitioner raised this argument for the first time in her amended petition for rehearing. 169a. The Tennessee Supreme Court rejected this argument, Order on Petition to Rehear (Nov. 23, 1992), A-1 as must this Court.

In this Proclamation, President Reagan "proclaim[ed] and declare[d] the unalienable personhood of every American, from the moment of conception until natural death. . ." 179-80a. Petitioner's argument that Article II, § 3 of the Constitution obligating the President to "take care that the laws be faithfully executed. . . ", gives Proclamation 5761 the force and effect of law was rejected by this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-

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[13](...continued)
so." *Id.* at 2873 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). But if a preembryo or fetus were recognized as a person with rights guaranteed under the Fourteenth Amendment, states would be prohibited from allowing legalized abortion.

[14] During his presidency, Ronald Reagan made 1,117 proclamations, including proclamations declaring: National Dairy Goat Awareness Week, 1988, Proclamation No. 5834, 53 Fed. Reg. 23377 (1988); National Sewing Month, Proclamation No. 4976, 47 Fed. Reg. 42543 (1982); Frozen Food Day, 1984, Proclamation No. 5157, 49 Fed. Reg. 8417 (1984); National Duck Stamp Week and Golden Anniversary Year of the Duck Stamp, 1984, Proclamation No. 5216, 49 Fed. Reg. 27729 (1984); National Catfish Day, 1987, Proclamation No. 5672, 52 Fed. Reg. 24127 (1987); National Know Your Cholesterol Month, 1988, Proclamation No. 5785, 53 Fed. Reg. 10521 (1988); and National Jukebox Week, 1988, Proclamation No. 5896, 53 Fed. Reg. 45063 (1988).

89 (1952). "Presidential proclamations and orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation of authority from Congress." *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 234 (8th Cir. 1975), *cert. denied sub nom. Consumer Fed'n. of America v. Butz*, 424 U.S. 966 (1976).[15] Proclamation 5761 cites no specific statutory mandate nor any other specific source of authority.[16] *See Butz*, 526 F.2d at 235.

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[15] *See also Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969) (Blackmun, J.), *cert. denied*, 397 U.S. 934 (1970); *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Philadelphia Elec. Co.*, 329 F.2d 3, 7-8 (3d Cir. 1964).

[16] Petitioner invokes President Lincoln's Emancipation Proclamation of January 1, 1863, in support of her contention that Proclamation 5761 is a "public law properly issued pursuant to President Reagan's "Executive Power" authority. Pet. at 14. In his Emancipation Proclamation, however, President Lincoln acted pursuant to powers expressly conferred upon him by the Constitution as Commander-in-Chief of the Army and Navy. His proclamation provides in relevant part:

> Now, therefore, I ABRAHAM LINCOLN, President of the United States, by virtue of the power in me vested as commander-in-chief of the army and navy of the United States, in time of actual armed rebellion against the authority and Government of the United States, and as a fit and necessary war measure for suppressing said rebellion, do, on this 1st of January, in the year of our Lord one thousand eight hundred and sixty-three, and in accordance with my purpose so to do, . . . order and designate as the States and parts of States wherein the people thereof, respectfully, are this day in rebellion against the United States the following and for the purpose aforesaid, I do order and decree that all persons held as slaves within said designated states and parts of states are, and henceforward shall be, free.

(continued...)

Nevertheless, Petitioner contends that this Proclamation is "the law of this land" and is "positive Federal law," Pet. at 13, somehow overruling *Roe*. This argument, as the Tennessee Supreme Court held, is "without merit." A-2. As this Court has held, "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 1 (Cranch) 137, 177 (1803), a holding which has been "unequivocally reaffirmed" in numerous subsequent decisions. *See, e.g., United States v. Nixon*, 418 U.S. 683, 703 (1974); *see also Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). Indeed, any other conclusion would permit the President to overrule any Supreme Court decision simply by signing an executive order or issuing a Proclamation. Such a result, however, would violate "the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *Nixon*, 418 U.S. at 704. Therefore, Petitioner's efforts to ground preembryo rights in President Reagan's Proclamation must fail.

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[16](...continued)
12 Stat. 1268-69 (1865). The Petitioner here cites neither a specific "Executive Power" contained in the Constitution, nor power conferred by statute, which would authorize President Reagan to make public law in the area of reproductive rights. Moreover, Petitioner's assertion that President Lincoln's Emancipation Proclamation freed the slaves is inaccurate. Pet. at 14. In fact, only those persons held as slaves in states in rebellion against the Union were affected by this proclamation. Because these states were not at that time under the jurisdiction of the United States, President Lincoln's Proclamation clearly could not free them. Slaves in states or parts of states not in rebellion against the United States, and those held in loyal slave states, thirteen parishes of Louisiana, forty-eight counties of Virginia and seven counties of eastern Virginia -- over 800,000 slaves -- were untouched by this proclamation. *See* John Hope Franklin, & Alfred A. Moss, Jr., *From Slavery to Freedom: A History of Negro Americans* 190-191 (6th Ed. 1988). Slavery was not ended until the ratification of the Thirteenth Amendment in 1865. *Id.* at 199.

Petitioner also argues that the Declaration of Independence requires reversal of the Tennessee Supreme Court's decision regarding the status of the preembryos. Pet. 19-23.[17] This argument, however, is not properly before this Court because it was raised for the first time in the petition for rehearing and the Tennessee Supreme Court did not expressly decide the question. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *American Surety Co. v. Baldwin*, 287 U.S. 156, 162-64 (1932); *Forbes v. State Council*, 216 U.S. 396, 399 (1910).

Moreover, while the Declaration of Independence may be used as a reference to construe the meaning of the Constitution, statements of principles contained in the Declaration of Independence do not have the force of law and therefore cannot be made the basis of judicial decisions as to the limits of the rights and duties. *See, e.g., Gulf, C. & S.F. Ry Co. v. Ellis*, 165 U.S. 150, 159-160 (1870).

Seeking to avoid the mandate of the law, Petitioner resorts to the claim that "new science of the world," Pet. at 15, requires this Court to reverse its consistent holdings that the unborn are not "persons" under the law.[18] Petitioner, relying exclusively on the testimony of Dr. Jerome Lejeune, argues that it is "uncontroverted" and "the accepted proof and knowledge of the entire scientific world community . . . ,"

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[17] Petitioner argues that the Declaration of Independence is the only document that can legitimately govern this case because it is based on the "laws of God," Pet. at 22, or "natural law" as defined by Hugo Grotius, author of the "'bestseller,' *The Truth of the Christian Religion*." Pet. at 20.

[18] Expert testimony at trial explaining the "new science" of IVF and cryopreservation support the Tennessee Supreme Court's conclusion that the preembryos are not "persons." *See supra* at 5-6. In fact the preembryos at issue in this case may not even have survived the freezing process, *see id.*, and therefore they may not even be "alive."

Pet. at 4, that the preembryos are "*children in vitro*." Pet. at 19.[19] The Tennessee Supreme Court, however, found that Dr. Lejeune's testimony was "disputed" by Dr. King whose "testimony was corroborated by the other experts who testified at trial . . . [and was] further supported by the American Fertility Society, an organization of 10,000 physicians and scientists who specialize in problems of human infertility." 38-39a. The court explicitly rejected Dr. Lejeune's testimony, concluding that: "[a]lthough he is an internationally recognized geneticist, Dr. Lejeune's background fails to reflect any degree of expertise in obstetrics or gynecology (specifically in the field of infertility) or in medical ethics. His testimony revealed a profound confusion between science and religion."[20] 38a.

Misquoting this Court's opinion in *Roe v. Wade*, Pet. at 16,[21] Petitioner also claims that because the "human embryo" can "exist on its own outside of the womb in a petri dish (artificial means) or stored in liquid nitrogen," *id.*, it is viable and deserves protection as a "person" under the Fourteenth Amendment. In *Roe* this Court defined viability as an "interim point at which the *fetus* becomes 'viable,' that is potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Roe v. Wade*, 410 U.S. at 160 (emphasis added). This Court also explained that the state's interest becomes compelling at

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[19] *See also* Pet. at 18 ("so Dr. Lejeune has rounded out the complete proof of the humanity of the preborn children").

[20] Consistent with the Tennessee Supreme Court's conclusion, Dr. Lejeune as quoted in the petition states: "*God* wants Mary's sevenfold hope to become children." Pet. at 18 (emphasis added).

[21] Petitioner states that "viability was defined by this Court as 'the ability to exist by natural or artificial means outside the womb.'" Pet. at 16.

viability "because the *fetus* then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163 (emphasis added). As the Tennessee Supreme Court noted:

> [E]ven as the Supreme Court in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), permitted the states some additional leeway in regulating the right to abortion established in *Roe v. Wade*, the *Webster* decision did no more than recognize a compelling state interest in potential life at the point when viability is possible. Thus, as Justice O'Connor noted, "[v]iability remains the 'critical point[.]'" *Id.* at 529 (O'Connor, J., concurring). That stage of fetal developmental is far removed, both qualitatively and quantitatively, from that of the four-to eight-cell preembryos in this case.

43a. Moreover, viability is not synonymous with personhood. As the court in *Roe* concluded, neither before nor after viability are fetuses "persons" under the law. *Roe*, 410 U.S. at 162.

While this Court has never directly addressed a case involving IVF or a dispute over frozen preembryos, the central question raised by Petitioner, whether the unborn are "persons," has "been so explicitly decided by this court as to foreclose further argument on the subject and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit." *Equitable Life Assurance Soc'y v. Brown*, 187 U.S. 308, 314 (1902). Indeed the federal claims Petitioner raises are wholly without merit, and her mere allegations of a federal question do not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or

decisions of the court as to leave no real room for real controversy," no jurisdiction lies. *Id.* at 311; *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

II. THE TENNESSEE SUPREME COURT'S DECISION CREATES NO NEW LAW AND DOES NOT CONFLICT WITH ANY PRIOR DECISION OF THIS COURT.

Petitioner asserts that the Tennessee Supreme Court's decision interferes with her right to privacy. Pet. at 7. It is clear from her petition, however, that this argument is not independent of the claim that the preembryos are "persons" and that she has a right to protect them. The only claim specific to Petitioner's own interests appears in one sentence asserting that her "greater physical burden in the in vitro fertilization process and in any future such process *in combination with* her desire to value and protect her offspring, constitutionally mandate that her wishes, rather than those of [respondent] be honored." Pet. at 7 (emphasis added). The right to privacy that Ms. Stowe asserts is contingent on her decision to "return the seven human embryos to the warmth of life so that they themselves may develop to term and be brought to live birth." Pet. at 8.

Petitioner therefore is not arguing that the Tennessee Supreme Court's balancing of two individuals' procreational autonomy rights is wrong because it failed to consider her right to bodily integrity, her life circumstance or because it will preclude her from ever having children.[22] Rather, she

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[22] The court's decision does not prevent Petitioner from having children through IVF with her new husband or through adoption. Rather, it prevents her from forcing Respondent to become a parent. (continued...)

believes that the balance should tilt in her favor because she values the preembryos as "unique individuals, and as her offspring," Pet. at 7, and Mr. Davis does not.[23]

Ironically, if Petitioner's argument, that the four-to eight-celled frozen preembryos are persons with separate and legally cognizable interests, were accepted, her right to reproductive privacy would be eviscerated.[24] As the Tennessee Supreme

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[22](...continued)
See Tr. I at 101-2, 104, 188 (indicating that Ms. Stowe would still be a good candidate for IVF if she chose to attempt it again).

[23] She argues that she has a right to protect her "offspring" because "the human embryos, as the offspring, descendants or progeny of man ARE MAN . . . " *Pet.* at 7 (uppercase letters in original). Because the preembryos are not offspring or children, neither Petitioner nor any other party may act on their behalf or assert for them claims of rights or privileges. *See, e.g., Poole v. Endsley*, 371 F. Supp. 1379, 1383 (N.D. Fla. 1974) ("the unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the [Fourteenth] Amendment."), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975). In this case, after Ms. Stowe changed her mind and decided to donate the embryos, *see* 62a n.1, R.D. Hash, a Tennessee attorney, sought to be appointed a guardian *ad litem* for the preembryos to "take those necessary actions *on a timely basis* to protect the "children *in vitro*'s welfare and best interests." Petition to Appoint a Guardian/Alternative Temporary Custodial Parent and/or For Charge of Temporary Custody, Filed June 20, 1990 in the Circuit Court for Blount County, Tennessee, No. E-14496 at ¶7 (emphasis in original). This request was denied. *See Davis v. Davis*, No. E. 14496 (Tenn. Cir. Ct., Blount County, Oct. 9, 1990).

[24] If Petitioner prevailed, the rights to use certain contraception, to choose to have an abortion, and to bodily integrity could be subordinated to that of the preembryo-persons. For example, many methods of birth control currently used in the United States and elsewhere are thought to operate, in whole or in part, to prevent
(continued...)

Court recognized, "[l]eft undisturbed, the trial court's ruling would have afforded preembryos the legal status of 'persons' and vested them with legally cognizable interests separate from those of their progenitors." 43a. This separate interest directly conflicts with the right to procreate and could, for example, deprive Petitioner of the right to use IVF in the future. Ms. Stowe could be foreclosed from using the procedure because the process of cryogenic preservation may result in damage or destruction of the "children in vitro". Pet. at 24.[25] Similarly, if she obtained custody of the preembryos and succeeded in having one or two children, she would, presumably, have no right to choose whether or not to implant or donate the remaining preembryos because it would be in their "best interests" to be implanted and given an "opportunity for live birth." 68a. Furthermore, if Ms. Stowe implanted three or four preembryos and all developed, she would, also presumably, be denied the right to choose to reduce her health risks by aborting some but not all of them. *See* Tr. I at 66.

Because Ms. Stowe views this case as one exclusively about preembryo-personhood, she also claims that the

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[24](...continued)
implantation of the fertilized egg in the uterine wall. *See* Brief for Association of Reproductive Health Professionals as *amici* in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605). These contraceptive methods could be outlawed because they "interrupt the development of . . . children and terminate their lives." Pet. at 23. Similarly, recognition of preembryo-personhood would prevent women from choosing abortion even at the very earliest stages of pregnancy. Such recognition could also require women to undergo unconsented surgery in the name of preembryo or fetal rights. *See e.g. In re: A.C.*, 573 A.2d 1235 (D.C. 1990) (*en banc)* (vacating a decision by a trial judge whose court ordered caesarean section designed to protect fetal life contributed to the death of both the fetus and the woman).

[25] *See also* Tr. II at 70, 82-83.

Tennessee Supreme Court has improperly created a new Federal right; the "father's" "right to kill by shelf-life his own child." Pet. at 24. *See also* Pet. at 24 (characterizing this right as the father's "right to choose death for the children"). No new rights, however, have been created in this case. The Tennessee Supreme Court merely recognized what this Court has long held: that there is a right of privacy that includes both the right to procreate and the right to avoid procreation. *See* 53a. This right is separately protected by the Tennessee State Constitution, which recognizes that the right of procreation "is a vital part of an individual's right to privacy." 52a.[26]

Moreover, it is beyond question that this right belongs to both men and women; to both Mr. Davis and Ms. Stowe. As this Court has held:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Eisenstadt v. Baird, 405 U.S. at 453 (1972) (emphasis in original); *see also Skinner v. Oklahoma ex rel. Williamson* 316 U.S. 535, 541 (1942).[27]

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[26] Petitioner's attack on this interpretation of Tennessee constitutional law, *see* Pet. at 7, is beyond the jurisdiction of this Court because it is wholly a question of state law. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

[27] The claim that Mr. Davis has "waived his right not to beget a new life" because he "consensually and expectantly took part in the process of facilitating the bringing together of his sperm and his wife's ovum," Pet. at 25, is without foundation. If that were the standard, then women who consented to intercourse or used contraceptives that

(continued...)

The Tennessee Supreme Court balanced both parties' right to procreate consistent with *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), virtually the only case Petitioner cites to support her argument. Pet. at 23-24. In *Danforth*, this Court held that in the context of abortion, the woman's right to procreate and her right to bodily integrity combine to override the man's single interest in procreation: "In as much as it is the woman who physically bears the child and who is more directly and immediately affected by the pregnancy, as between the two the balance weighs in her favor." *Danforth*, 428 U.S. at 71.

The Tennessee Supreme Court, like this Court in *Danforth*, considered the rights at stake and balanced the interests of both parties. The court took into account that in cases involving IVF, "[n]one of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions is applicable here." 54a. This is so because the preembryos are outside the woman's body. *Id.* In the end, after weighing Mr. Davis's interest in not becoming a father against Ms. Stowe's interest in donating the preembryos, and considering their life circumstances and the possibilities Ms. Stowe had for having children in the future, the court ruled in Mr. Davis's favor. 59-60a.[28]

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[27](...continued)
failed would be precluded from choosing to have abortions -- a conclusion foreclosed by this Court's decisions from *Roe* to *Casey*. Moreover, Petitioner's assertion that contraceptive rights apply only to prefertilization devices has never been accepted by this Court. *See Webster*, 492 U.S. at 565-66 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 523 (O'Connor, J., concurring in part and concurring in the judgment) ("It may be correct that the use of post-fertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny").

[28] The Tennessee Supreme Court was careful to note that its decision "does not contemplate the creation of an automatic veto." 59a.

The *Davis* decision thus represents the state court's narrow balancing of two individual's procreational autonomy rights. The decision does not create new law relative to the contours of the Fourteenth Amendment, nor does it conflict with prior decisions of this Court. Accordingly, none of the bases for granting a writ of certiorari asserted by Petitioner and set forth in Sup. Ct. R. 10.1(c) are present here.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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February 2, 1993

APPENDIX

IN THE SUPREME COURT OF TENNESSEE

AT KNOXVILLE

JUNIOR L. DAVIS,	)	Not for Publication
	)	
Plaintiff-Appellee	)	
	)	No. 34
v.	)	
	)	Blount County
MARY SUE DAVIS,	)	
	)	
Defendant-Appellant.	)	

ORDER ON PETITIONS TO REHEAR

The Court has before it two petitions to rehear, one filed by the appellant, Mary Sue Davis, and the other filed jointly be the appellee, Junior Davis, and by the Knoxville Fertility Clinic as a putative third-party defendant. Although it would serve the goal of judicial economy if we could direct this order to the Knoxville Fertility Clinic as a party in interest, the record shows that the Clinic was dismissed as a party by the trial court, that the Clinic did not appeal the trial court's judgement, and that it is therefore, no longer an active party in this lawsuit. Nevertheless, the Clinic is obviously affected by the outcome of this case, and we commend the willingness of its director, Dr. Ray King, to follow the directions of this Court.

1. ***Petition to Rehear by Mary Sue Davis***

The appellant's petition alleges that the Court's opinion incorrectly states the facts. However, the gist of the complaint is, first, that the Court refused to accept as scientific fact the opinions of Dr. Jerome Lejeune and, second, that we did not have his complete testimony before us. If the transcript of Dr. LeJeune's testimony was not complete, it was the obligation of counsel to see that the appellate record presented to the Court of Appeals and to this Court was properly supplemented. The matter of the transcript's purported inadequacy to convey Dr. Lejeune's testimony has been waived. Furthermore, we find no merit to the contention that the Court has failed to accord sufficient weight to the testimony that is included in the record.

The petition also takes issue with our interpretation of the state constitution. We find no merit to the contention that the provisions in Article I, Section 34 must be construed to mean that human embryos are entitled to the same status as "man" under the Tennessee Constitution.

Finally, the appellant's petition takes the position that our opinion violates an executive order, namely Presidential Proclamation No. 5761, signed by Ronald Reagan on January 14, 1988, in which President Reagan "proclaim[ed] and declare[d] the unalienable personhood of every American, from the moment of conception until natural death . . . " The appellant argues that this presidential proclamation is a "public law" and that its "scope . . . extends to the Constitution, its interpretation and execution." We know of no authority which mandates our submission to presidential proclamations such as the one involved here, which is in direct conflict with both the state and federal constitutions. We find the argument without merit.

The remainder of the petition is merely argumentative and provides no *legal* basis for a rehearing.

2. *Petition to Rehear by Junior L. Davis*

In this petition to rehear, Junior Davis and Dr. King seek the Court's guidance in what disposition should be made of the cryogenically-preserved pre-embryos that were the subject of dispute in this case. We had previously indicated in our opinion that the Fertility Clinic was at liberty to follow its normal procedure with regard to surplus or unwanted pre-embryos, as long as the procedure was not in conflict with the opinion. According to Dr. King, however, his usual procedure is to donate surplus pre-embryos to a childless couple for procreational purposes. Such a disposition is *not* authorized under the opinion, because it is the very outcome that Junior Davis has sought to avoid, and one which we have held to be constitutionally unavailable over his objection.

The only other dispositions suggested by the American Fertility Society's Ethics Committee in its June 1990 report, cited in the opinion, would be donation of the pre-embryos for approved research or their discard. Of course, donation for research would require the consent of both Mary Sue Davis and Junior L. Davis. If they cannot agree on this alternative, Dr. King's only other choice is to discard the pre-embryos in question.

We remand this case to the trial court for further proceedings within the narrow limits of this order.

3. *Motion to Substitute Counsel of Record*

The appellant's motion to substitute as counsel Richard D. Hash of Maryville, Tennessee, is hereby GRANTED. As to

the application of attorney John W. Brabner-Smith of Washington D.C. and attorney R. Martin Palmer, Jr., of Hagerstown, Maryland, the Court will permit their appearance in this case only. The names of Mary Sue Davis's former counsel, Kurt Erlenback and Susan Erlenback of Titusville, Florida, will be removed as attorneys of record.

The petition to rehear filed on behalf of Mary Sue Davis is hereby DENIED. The petition to rehear filed on behalf of Junior L. Davis is hereby GRANTED, but only for the limited purpose of remanding this case for an order by the trial court in conformity with this order.

ENTER, this 23rd day of November, 1992

PER CURIAM